RECORD AND BRIEFS

No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.;
AND JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,

Respondents.

On Writ of Certiorari
to the Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* INTERNATIONAL CHRISTIAN PHOTOGRAPHERS AND CENTER FOR ARIZONA POLICY IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

International Christian Photographers ("ICP") is an association of like-minded photographers who believe their faith guides how they practice the art of photography. Founded almost thirty years ago, the association has had members in every state, as well as members from several countries around the world.

As an association of Christian photographers, the ICP has a unique understanding of how photography creates and tells stories and expresses powerful messages to clients and the world alike. The ICP represents members with a wide range of photography experience, including weddings, portraits, newborns, and landscapes, to name a few subjects. This allows the ICP to provide a rich perspective regarding photography as a unique form of expression. It also knows well the practice of many individuals and photographers who integrate faith principles with business services.

Of particular relevance to this case, ICP members often work in wedding photography. The ICP has an

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[1] Petitioners and the Respondent Colorado Civil Rights Commission have filed blanket consents with the Supreme Court; their consents are on file with the Clerk. Counsel for the individual Respondents Craig and Mullins granted consent to the filing of this brief; their consent accompanies this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief. In addition, Michael J. Norton, one of the counsel for *amici*, was formerly associated with Alliance Defending Freedom and, in that capacity, served as counsel for Petitioners in the courts below.

interest in protecting the First Amendment rights of photographers to be free from compelled speech and to freely exercise religion without undue government interference.

ICP's members are diverse and some may not hold a religious objection to photographing a same-sex wedding or celebration. Those that do object do so on the basis of sincerely held religious beliefs. The association is united, however, on each photographer having the right to act consistent with his or her sincere religious convictions on this developing and, often, emotionally-charged issue. ICP's voice will assist this Court in the evaluation of the free speech and free exercise rights raised by Masterpiece Cakeshop.

Center for Arizona Policy ("CAP") promotes and defends the foundational values of life, marriage and family, and religious freedom. As a nonprofit advocacy group, CAP works with state legislators and other elected officials at all levels of government to ensure that public policy promotes foundational principles. CAP has an interest in protecting the First Amendment rights of creative professionals to live according to their sincerely held religious beliefs.

SUMMARY OF ARGUMENT

The sincerely held religious beliefs of Petitioner Jack Phillips that preclude him from designing and creating a wedding cake for a same-sex wedding ceremony are broadly held by many people in our society, including *Amici*. Many Christian photographers, for example, likewise have religiously grounded objections to being compelled to participate

in a same-sex wedding ceremony. The conflict between people of sincere religious faiths and public accommodation laws has become increasingly common. If the Colorado Court of Appeals decision is allowed to stand, many people of faith will no longer be willing or able to participate in the wedding industry.

The First Amendment forbids that result. Just as wedding photography is a form of artistic creation subject to First Amendment protection, so is the work of designing and creating custom wedding cakes.

Unfortunately, the Colorado Court of Appeals failed to protect the Petitioners' free speech rights by failing to adhere to correct First Amendment doctrine. Instead, the court minimized the artistic nature and value of Petitioner's custom cake designs by applying outmoded case law regarding anti-war protest conduct, not artistic expression. The proper First Amendment protection for artistic expression should preclude the State of Colorado from compelling the Petitioner to design and create art in such circumstances. The expressive conduct cases from this Court, in contrast, entail the free speech rights for certain types of conduct, and do not involve those creative endeavors, such as custom cake designs, that result in a traditional and significant communicative form (*e.g.*, wedding cakes). Regardless, even under the narrower expressive conduct cases, the Petitioner's creative activity should have been protected under the Free Speech Clause.

The Colorado court justified its unconstitutional interpretation and application of the State's public accommodation statute because it was purportedly

rationally related to the State's interest in eliminating discrimination in places of public accommodation. Yet this interest, however noble and well-intended it may be, should not trump our historic First Amendment protections. Numerous courts have invalidated certain limited applications of anti-discrimination laws that have resulted in compelling speech.

Nor does the fact that Petitioner is a closely-held for-profit entity require a different result. Commissioned speech made for others is protected under the First Amendment. Expressive speech is no less creative or protected merely because it is performed in the service of others or for compensation.

Accordingly, the lower court decision should be reversed.

ARGUMENT

I. The Colorado Court of Appeals' Opinion Undermines the Rights of Citizens and Businesses Far Beyond the Petitioner.

Applying Colorado's public accommodation law to force Petitioner Phillips to design and create a wedding cake for a same-sex wedding celebration and then to actually participate in the wedding celebration by delivering and setting up his artwork jeopardizes the right of many other citizens who desire to act and speak consistent with their sincerely held religious beliefs. Photographers, in particular, are vulnerable to the same conflict in this case: namely, the use of public accommodation laws to force

creative professionals to speak and act against their beliefs.

Without a doubt, the decisions in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) have recognized new rights for same-sex couples to receive state marriage licenses as well as the rights and benefits of marriage under state and federal law. Those rights are not at issue here.[2] Instead, the rights at issue here are those of creative professionals who want to live according to their faith and not be compelled to create art that violates their conscience.

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[2] Indeed, the facts of this case pre-date *Obergefell* by nearly three years. In July 2012, when Respondents requested that Petitioner design and create a wedding cake to celebrate their same-sex wedding, the wedding being celebrated had taken place in Massachusetts, not Colorado. At that time, Colorado's constitution provided that the only valid marriage which could be solemnized or recognized in the state of Colorado was the marriage of one man and one woman. In other words, at that time, no one in the state of Colorado could have issued valid marriage licenses or married a same-sex couple. *See* Colo. Const. Art. II § 31. Colorado did not begin recognizing same-sex marriages until October 7, 2014, and this Court did not render its opinion in *Obergefell v. Hodges*, 576 U.S. ___ (2015), until June 26, 2015. *See Craig*, 370 P.3d at 277 n. 1. Thus, aside from considerations of conscience, it was fundamentally unfair for the State of Colorado to force Petitioner to celebrate an activity that was not recognized under its own laws.

A. The Lower Court's Decision Will Curtail The Rights Of Christian Photographers Who Have A Religious Conviction That Precludes Support For Same-Sex Marriage.

The decision by the Colorado Court of Appeals will be used against many other creative professionals engaged in the wedding service industry who have sincere religious convictions that mandate that they not participate in same-sex weddings or celebrations. For ICP members who engage in wedding photography, this is not mere speculation. The Colorado Court of Appeals relied, repeatedly, on *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), a public accommodation case from New Mexico that resulted in a Christian photographer being found in violation of New Mexico law for declining to photograph a same-sex wedding. The Colorado court endorsed the holding and reasoning of *Elane Photography*, leaving no doubt that the decision will influence the way Christian photographers operate in Colorado. *See, e.g., Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 281-82, 286-87 (Colo. App. 2015).

The lower court decision in this case will provide a roadmap for litigation against Christian photographers who are bound by religious conviction not to offer their artistic talents to photograph a same-sex wedding ceremony or celebration. The core facts in this case cannot be limited to the parties and circumstances. The same scenario could have just as easily arisen from a Christian photographer who holds similar religious convictions to those of Petitioner Phillips.

As explained in more detail below, photography provides an irreplaceable form of expression that should not, consistent with First Amendment precedent, be subject to compelled speech on account of a state public accommodation law. *See infra* part II. Absent correction from the Court, Christian photographers will have their rights chilled by the prospect of litigation under the legal theories adopted by the Colorado Court of Appeals below.

B. The Lower Court Decision Will Curtail The Rights Of Many Citizens And Businesses, Not Just Cake Designers And Photographers.

Christian photographers and cake designers, like Jack Phillips, are not the only creative professionals who face the prospect of being "made an example of" through future litigation. The facts of this case may be readily replicated across the spectrum of wedding services providers whose creativity and expressive talents are the bases for their work. All that is necessary to trigger legal liability for acting consistent with one's religious conscience, under the lower court's holding, is for the service provider (a public accommodation under the Colorado statute) to decline to serve a prospective customer's same-sex wedding. The following list highlights some affected businesses:

- Photographers
- Videographers
- Cake Artists
- Florists
- Website Designers

- Singers and DJs
- Calligraphers
- Painters

The tension between creative professionals whose religious beliefs inform their work and public accommodation laws has increased in recent years. Prominent cases have been brought against various artists, such as cake artists, photographers, and florists. Because those who do hold such sincere religious beliefs are inclined to follow God's law not man's law, the conflict is not likely to dissipate as the number of same-sex weddings increases throughout the country.

All these types of businesses are currently subject to potential litigation, and may be forced to cease offering some or all of their creative talents in the public arena. Citizens who believe they are called to act consistent with their sincerely-held religious beliefs in both public and private life will face increasing pressure to withdraw from public life and refrain from speaking and acting consistent with those beliefs. With the dramatic increase in litigation across the country involving same-sex weddings and religious institutions or individuals who are conscience-bound not to celebrate a form of marriage contrary to their religious conviction, there will be far more disputes under this law and similar laws in the future.

C. Wedding Photography Is The Artistic Expression Of The Photographer And Thus Protected By The First Amendment.

The members of ICP who chronicle wedding stories through the medium of photography are engaged in protected First Amendment expression. While relatively new on the scale of recorded history, photography has become a universally-beloved form of artistic expression: "Ever since 1839 photography has been a vital means of communication and expression." Beaumont Newhall, *The History of Photography* 7 (5th ed. 1988); Bill Hurter, *The Best of Wedding Photojournalism* 15 (2d ed. 2010) ("Above all, the skilled wedding photojournalist is an expert storyteller.").

> Photography is a form of non-verbal communication. At its best, a photograph conveys a thought from one person, the photographer, to another, the viewer. In this respect, photography is similar to other forms of artistic communication such as painting, sculpture, and music.

Bruce Barnbaum, *The Art of Photography: An Approach to Personal Expression* 1 (1st ed. 5th update 2012). As with more traditional forms of art, many photographers decline to create art that conveys a message contrary to the artist's religious beliefs.

If allowed to stand, the court of appeals' decision threatens the ability of religiously-motivated photographers to create art without being compelled to endorse and express a message about a same-sex

wedding or celebration that conflicts with their sincere convictions. Many photographers who ply their craft for weddings command a premium price due to the artistic value of their skill. It is common for photographers to spend substantial time and effort attending the ceremony, setting up and obtaining the perfect wedding shot, and then editing the raw images to imprint their unique voice on the finished product. Wedding photography is not fungible. All the characteristics of artistic expression are seen in the wedding photography sphere.

II. Colorado Has Undermined Broadly-Held Free Speech Rights.

The First Amendment's cherished right to free speech sits at the core of the American system of government. Free speech is a core right in the United States, distinguishing our country from so many others around the world. This cherished right to free speech is imperiled by the lower court's application of Colorado's public accommodation law in this case. The members of ICP recognize that the threat to this constitutional right will chill artistic expression beyond the parties to this case. Moreover, free speech often protects, as in this case and as it should, religiously-motivated speech, thereby implicating a second right found in the text of the Constitution. A failure to correct the lower court's opinion will deny free speech protections that should serve as an important bulwark of individual liberty.

The Free Speech Clause has a venerable tradition of protecting communication and activity beyond the paradigmatic case of audible speech. Petitioner's

artistic custom cake designs, similar to the artistry of photography that members of ICP are familiar with, most naturally fit within this Court's artistic expression line of cases. The court below, however, erroneously analyzed the Petitioner's creative activity through the lens of expressive conduct cases and then compounded the error by misapplying the current state of free speech doctrine from those cases.

This Court should correct this error by treating Petitioner's artistic creation as fully protected free speech, or at the very least, recognizing that it must be protected as expressive conduct in these circumstances.

A. Robust Free Speech Protections Outside The Expressive Conduct Cases Prohibit Colorado From Compelling The Creation Of Art For A Wedding.

The State of Colorado brings the power of the State to bear against Petitioner Phillips to force a conscientious objector to same-sex marriage to design and create a customized, artistically-designed wedding cake and then to actively participate in the event by delivering his creation to and setting it up at the ceremony. The First Amendment protects Petitioner from being so compelled. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) ("[T]he First Amendment stringently limits a State's authority to compel a

private party to express a view with which the private party disagrees.").

In *Wooley*, the Court examined New Hampshire's law compelling citizens to express the state motto, "Live Free or Die" on license plates. The Court held that requiring this expression made the citizens "an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable," and this violated the First Amendment. 430 U.S. at 715. This was so because "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster ... an idea they find morally objectionable." *Id.*

This Court has consistently shielded private citizens from governmental efforts to compel them to speak against their will. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (government may not compel a newspaper to print an unwanted editorial). It matters not that the speech to be protected in this case is artistic, a customized wedding cake, rather than verbal speech or written words. The Free Speech Clause has long protected communication in forms other than verbal speech.

For example, this Court has recognized that paintings, music without lyrics, and poetry are afforded robust First Amendment protection. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (speaking of the "unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll"); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("The Constitution prohibits [censorship of music] in our own legal

order."). Still other cases establish that "pictures, films, paintings, drawings, and engravings," are similarly protected. *See Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (stating that "[a]s with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection"); *Bery v. City of New York*, 97 F.3d 689, 695 (2nd Cir. 1996) ("Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.").

Artistic creation has thus long garnered free speech protection as communication outside the literal speech rubric. One lower court has helpfully reviewed the wide range of protected art cases as examples of "self-expression." *See Cressman v. Thompson*, 798 F.3d 938, 951–53 (10th Cir. 2015) (reviewing artistic creation cases). Petitioner's artistic creations easily fall within the protected realm of self-expression such as paintings, music, and pictures. The "expressive character" of a custom wedding cake, like artistic photography, "falls within a spectrum of protected 'speech' extending outward from the core of overtly political declarations." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting). "That suffices to confer First Amendment protection. Under our Constitution, 'esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.' *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818, 120

S.Ct. 1878, 146 L.Ed.2d 865 (2000)." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 790 (2011).

The First Amendment does not merely protect the finished product, even the artists' creative process of designing and creating a custom wedding cake (or creating a photograph) and the business of selling it are protected. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060-63 (9th Cir. 2010) (tattoo artist's process, product, and business so intertwined that all are entitled to constitutional protection). *Accord Buehrle v. City of Key West*, 813 F.3d 973, 978 (2015) (dismissing as outmoded "the idea that a tattoo represents the expression of the wearer and not the tattoo artist").

Similar to the circumstances of this case, this Court has already taken up the conflict between the right against compelled speech in the context of anti-discrimination laws protecting sexual orientation. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 566 (1995), this Court considered whether an annual parade in Boston, organized by a private party, could be forced as a "public accommodation" to admit a gay and lesbian group to march in the parade, contrary to the wishes of the parade organizers. Writing for a unanimous Court, Justice Souter held that it was a violation of the defendants' free speech rights to require them to alter the expressive content of their parade. The parade organizers excluded a gay pride float, not homosexuals as individuals, which was a protected exclusion under the First Amendment.

As this Court explained in *Hurley*, "[t]he protected expression that inheres in a parade is not

limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression." 515 U.S. at 569. Thus, even though the participant being excluded was "equally expressive," all speech "inherently involves choices of what to say and what to leave unsaid ...." *Id.* at 570. This Court held the state public accommodation law, while having a "venerable history," had to make way for the parade organizers' right to be free from compelled expression. *Id.* at 580–81. Here, as a matter of compelled artistic expression, the Petitioner's free speech rights were violated by the State of Colorado.

B. Even If Viewed As Expressive Conduct, Petitioner's Artistic Creations Are Fully Protected By The First Amendment.

The lower court failed to protect the Petitioner's creative work as free speech akin to traditional artistic creations such as paintings, music, or pictures. Instead, the court looked upon outmoded protest conduct cases as justifying the lack of free speech protection for custom wedding cakes. This was both the wrong doctrine and the wrong conclusion.

First, the lower court should not have applied the protest activity cases, such as *Spence v. Washington*, 418 U.S. 405 (1974), and *Texas v. Johnson*, 491 U.S. 397 (1989), because those cases deal with conduct where the citizen's activity itself is part of the expression. With flag burning, for example, there is no expressive product designed and created; it is simply the act of destroying a flag in protest that is inherently expressive. Creating a custom wedding cake design for a wedding is more like the protected

works of art discussed in *Hurley* than like the anti-war protests of *Spence* or *Johnson*. *See Hurley*, 515 U.S. at 569 (speaking of the "unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll"). In *Hurley*, there was no discussion of whether paintings or orchestral music meet the two-part test as discussed in *Spence*. *See id.*

While the artistry involved in creating a customized wedding cake is without question expressive, it is not the same as the expressive conduct line of cases running through *Spence* and *Johnson*. Rather, the wedding cake here is a work of art in its finished product—not simply based on the act of creating it. Accordingly, it should not be subject to the test in *Spence* nor the "inherently expressive" test articulated in *Rumsfeld*. The Petitioner's conduct is afforded more First Amendment protection than the expressive conduct line of cases because it is "unquestionably shielded" as a work of art. *Hurley*, 515 U.S. at 569.

Second, even under the expressive conduct line of cases, the Petitioner's activity should have been protected as free speech. This Court's expressive conduct free speech cases have focused almost exclusively on protest activity, where the physical activity of the citizen, be it tearing up a draft card or burning an American flag, communicates a message. Before this Court's seminal decision in *Texas v. Johnson*, 491 U.S. 397, 399–402 (1989), upholding the burning of the American Flag as protected free speech, some courts, such as the lower court here, have required so-called expressive conduct to

communicate a particular message in order to qualify for free speech protection.

This additional requirement for free speech protection derived from *Spence*, where this Court protected an individual's protesting of military activity by displaying a flag upside down with a peace symbol taped onto the flag. 418 U.S. 405. The *Spence* opinion, contrasting the protest activity with an "act of mindless nihilism" noted that "an intent to convey a particularized message was present." *Id.* at 410–11. This Court has clarified in later cases that even expressive conduct of the protest variety need not be reducible to one precise message to garner free speech protection. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (analyzing military protest activity without reiterating any *Spence* test for a particularized message). The Court now describes protected protest activity as being "inherently expressive" as opposed to conveying any specific message. *Id.* at 66.

Even under the protest cases, as this Court's most recent precedent establishes, the Petitioner's activity in designing and creating a wedding cake should have been given free speech protection because the challenged conduct is, without question, communicative and inherently expressive. A particularized message requirement is also satisfied, for a wedding celebration necessarily means that a marriage has occurred and the couple should be celebrated. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). ("We have no difficulty concluding that wedding ceremonies are protected expression under the First Amendment."). Thus, if this Court applies the expressive conduct line of cases to

Petitioner's cake art, the activity deserves First Amendment protection.

In sum, the Petitioner's communicative activity fits more precisely with artistic conduct afforded more robust free speech protection than the anti-military protest activity in the expressive conduct line of cases. Under either line of cases, the Petitioner's conduct should have been afforded protection.

III. Neither Colorado's Interest In Combating Discrimination Nor The Commissioning Of The Speech At Issue Is A Sufficient Justification For The State To Compel Expressive Conduct That Violates The Artist's Conscience.

A. Lower Courts Routinely Invalidate Anti-Discrimination Laws That Compel Speech.

The lower court "easily conclude[d]" that Colorado's purportedly neutral and generally applicable[3] public accommodations law "is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation." *Craig*, 370 P.3d at 293. But Colorado's public accommodation law does not trump Petitioner's constitutional right to not speak. The duty to protect constitutional rights "holds true even when protecting individual rights affects issues of the utmost

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[3] As explained in Petitioner's Opening Brief at pages 38-46, the statute is not neutral or generally applicable.

importance and sensitivity." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

Public accommodation laws create no exception. Courts have frequently scrutinized such laws for infringing speech. *See Christian Legal Soc. v. Martinez*, 561 U.S. 661, 680 (2010) ("In the context of public accommodations, we have subjected restrictions on that [First Amendment] freedom to close scrutiny"). *See also Apilado v. N. Am. Gay Amateur Athletic All.*, No. C10-0682-JCC, 2011 WL 5563206, at *1 (W.D. Wash. Nov. 10, 2011) (enjoining Washington public accommodation law for violating First Amendment by compelling gay softball team to admit heterosexual players); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (declaring that city would violate First Amendment by using public accommodation law to exclude all male event from city convention center). And this Court has twice enjoined such laws for violating the First Amendment, once for compelling speech and once for compelling expressive association. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley*, 515 U.S. at 581.

As this history shows, bureaucrats have long used public accommodation laws as cudgels to quash ideas, especially unpopular ones. But courts have just as frequently stopped this abuse. This Court should do the same and protect Petitioner and other creative professionals from the unconstitutional application of the Colorado public accommodation law.

B. Commissioned Speech Made For Others Is Protected Under The First Amendment.

Colorado cannot avoid the deference due Petitioner's constitutional rights merely because Petitioner creates expression professionally. Free speech protects the amateur and professional alike. This point is so well-established that courts have protected the speech of for-profit painters, tattoo designers, and writers. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5 (1988) ("the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away"); *Anderson*, 621 F.3d at 1063 ("Thus, we conclude that the business of tattooing qualifies as purely expressive activity..."); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (protecting sale of painting); *Coleman v. City of Mesa*, 230 Ariz. 352, 360 (2012) ("the business of tattooing is constitutionally protected."). The fact that the "production, distribution, and exhibition" of speech "is a large-scale business conducted for private profit...." does not prevent that speech "from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (discussing for-profit movie studios).

Just as the government cannot ban speech made for-profit, the government cannot compel it, either. This Court has repeatedly protected businesses from compelled speech. *See Riley v. Nat'l Fed. Blind*, 487 U.S. 781, 784 (1988) (for-profit fundraisers); *Pac. Gas & Elec. v. PUC*, 475 U.S. 1, 4 (1986) (for-profit electric

company); *Tornillo*, 418 U.S. at 243 (for-profit newspaper). And when this Court confronted a public accommodation law in *Hurley*, it reiterated that the right not to speak is "enjoyed by business corporations generally...as well as by professional publishers." 515 U.S. at 574.

Unsurprisingly, courts have used this logic to stop public accommodation and similar antidiscrimination laws from compelling businesses to speak. In Kentucky, for example, a circuit court enjoined a public accommodation law for compelling a for-profit print shop to print t-shirts for a gay-pride festival. *Hands on Originals, Inc. v. Human Rights Comm'n*, No. 14-CI 04474 (Fayette Cir. Ct. Apr. 27, 2015). And in Tennessee, a federal court enjoined part of the 1866 Civil Rights Act for compelling a for-profit television studio to cast actors of a particular race. *Claybrooks v Am. Broadcasting Cos.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012). As these cases show, anti-discrimination laws do not get a free pass. They cannot compel businesses to speak just as they cannot compel parade organizers to. Words and photographs do not lose their constitutional protection when made for money.

Nor do words, photographs, or custom designed cakes lose their constitutional protection when made for someone else, for free speech protections do not turn on the creator/buyer relationship. Free speech is not "a mantle, worn by one party to the exclusion of another and passed between them depending on the artistic technique employed, the canvas used, and each party's degree of creative or expressive input...[T]he First Amendment's safeguards are not so neatly cabined. Protected artistic expression

frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work." *Buehrle*, 813 F.3d at 977.

On this logic, creators speak through and retain interests in their creations, regardless who they create for, how much control they exercise, or how much compensation they receive. As the Ninth Circuit explained, "[t]he fact that both the tattooist and the person receiving the tattoo contribute to the creative process or that the tattooist . . . 'provide[s] a service,' does not make the tattooing process any less expressive activity, because there is no dispute that the tattooist applies his creative talents as well." *Anderson*, 621 F.3d at 1062.

This same logic applies to commissioned photography. Indeed, one federal court has already found commissioned photography to be protected speech because "[t]he City cites no authority for the proposition that commissioned works are excluded from the protection of the First Amendment, and common sense and even a casual acquaintance with the history of the visual arts strongly suggest that a commissioned work is expression." *Baker v. Peddlers Task Force*, No. 96 CIV. 9472 (LMM), 1996 WL 741616, at *1 (S.D.N.Y. Dec. 30, 1996).

If commissioned works are not protected, the government may ban the speech of every writer, attorney, web designer, tattoo parlor, printer, publisher, photographer, sign maker, cake designer, and advertising firm hired to create for someone else. But we know the government cannot do that. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545-46 (2001)

(invalidating law regulating legal services on behalf of clients on speech grounds); *Simon & Schuster, Inc. v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (acknowledging that both author and publisher had First Amendments rights); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 86, 92-97 (2d Cir. 2006) (holding that street vendors had First Amendment right to create and sell clothing with artwork "customized on the spot according to the client's request"); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 925 (6th Cir. 2003) ("Publishers disseminating the work of others who create expressive materials also come wholly within the protective shield of the First Amendment."). And if the government cannot ban speech made for someone else, the government cannot compel it, either. *See Riley*, 487 U.S. at 795-98 (protecting fundraisers paid to communicate someone else's message from compelled speech); *Hands on*, No. 14-CI 04474 at 7-13 (holding that public accommodation law could not compel print shop to print customer's t-shirts).

Newspapers exemplify this point. When newspapers accept advertisements or editorials from the general public for a fee, those newspapers publish someone else's speech for profit. The newspapers do not create or change the message. They merely publish the advertiser's message so that the advertiser can speak to the advertiser's audience. No one would think the newspaper necessarily "speaks" or endorses those advertisements. Despite this, many courts have protected the right of newspapers to decline others' advertisements and editorials as the newspapers see fit. *See Tornillo*, 418 U.S. at 256-58 (holding that state statute could not force newspaper to publish someone

else's editorial); *Groswirt v Columbus Dispatch*, 238 F.3d 421, *2 (6th Cir. 2000) (holding that newspaper had First Amendment right not to publish someone else's letter); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (holding that First Amendment protects newspaper's right to reject advertisement submitted by a homosexual group); *Sinn v. Daily Nebraskan*, 638 F. Supp. 143, 146–47 (D. Neb. 1986) (holding that newspaper could not be forced to print someone else's advertisement seeking a lesbian roommate); *Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.*, 92 Wis. 2d 709, 713, 285 N.W.2d 891, 894 (Ct. App. 1979) (holding that newspaper could not be forced to print someone else's paid advertisement because of First Amendment). In other words, free speech principles protect the editorial judgment of the speaker no matter where their speech came from.

Now if the government cannot compel for-profit newspapers to publish someone else's message when newspapers solicit messages from the general public, charge to publish those messages, and publish those messages unchanged, the government surely cannot compel a for-profit custom cake designer (or photographer) to create a message from scratch and then be required to deliver it and thereby convey it to others. Cake designers and photographers contribute much more to cakes and photographs they make from scratch than newspapers contribute to advertisements made by someone else. For this reason, creative professionals like photographers and custom cake designers have stronger claims against being compelled to speak than even a newspaper. Infringing this freedom, Colorado compels Petitioner

Phillips to speak a message his conscience finds objectionable, in violation of his First Amendment rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the Colorado Court of Appeals.

Respectfully submitted,

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